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Supreme Court, U.S.
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March 16, 2000

By Federal Express

Clerk of the Court
United States Supreme Court
U.S. Supreme Court Building
One First Street, N.E.
Washington D.C. 20543

Re: Artuz v. Bennett, 99-1238

Dear Clerk of the Court:

Enclosed please find ten copies and one original of Respondent Tony Bennett's Brief in Opposition to the Petition for Writ of Certiorari filed in the above-referenced case. Pursuant to Rule 39 of the Supreme Court Rules, Mr. Bennett respectfully moves for permission to proceed *in forma pauperis*. Undersigned counsel was appointed by the Second Circuit to represent Mr. Bennett pursuant to the Criminal Justice Act of 1964, 18 U.S.C. § 3006A.

Thank you for your consideration in this matter.

Respectfully yours,

Ellen B. Resnick

Ellen B. Resnick

(Enc.)

cc: John M. Castellano (By Federal Express)
Appeals Bureau
Office of the Queens County District Attorney
125-01 Queens Boulevard
Kew Gardens, New York 11415

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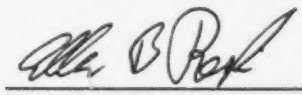
CERTIFICATE OF SERVICE

Pursuant to Rule 29 of the Supreme Court Rules, I, Ellen B. Resnick, affirm that:

1. I was appointed by the Second Circuit to represent Tony Bruce Bennett, the Respondent in this action, pursuant to the Criminal Justice Act of 1964, 18 U.S.C. § 3006A.

2. Three copies of Respondent's Brief in Opposition to Petition for Writ of Certiorari in *Artuz v. Bennett*, No. 99-1238, was sent on March 16, 2000 by Federal Express to John Castellano, Esq., Assistant District Attorney for the Queens District Attorney's Office Appeals Bureau, 125-01 Queens Boulevard, Kew Gardens, New York 11415. ((718)-286-5801)

3. There are no other parties in this action.



Ellen B. Resnick

QUESTION PRESENTED

Is a successive state court post-conviction application "properly filed" within the meaning of 28 U.S.C. § 2244(d)(2), which tolls the one-year statute of limitations for habeas corpus petitions in the Anti-Terrorism and Effective Death Penalty Act of 1996, if it is filed in a court that declines review of the application on the merits because the application is procedurally barred?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

RESPONDENT'S BRIEF IN OPPOSITION 1

STATEMENT OF THE CASE 1

REASONS FOR DENIAL OF THE WRIT 1

I. THE SECOND CIRCUIT'S DECISION IS CONSISTENT WITH ALL BUT ONE OF THE SIX OTHER CIRCUITS THAT HAVE ADDRESSED WHAT CONSTITUTES A "PROPERLY FILED APPLICATION" FOR PURPOSES OF TOLLING THE STATUTE OF LIMITATIONS UNDER THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996. 2

II. REVIEW BY THIS COURT IS UNWARRANTED. 7

A. STATES CAN INDEPENDENTLY LIMIT ACCESS TO FEDERAL COURT 7

B. 28 U.S.C.§ 2244(d)(2) APPLIES TO VERY FEW REMAINING PETITIONS 8

C. THE COURT MUST DELVE INTO THE MERITS OF RESPONDENT'S STATE CLAIMS 9

CONCLUSION 10

TABLE OF AUTHORITIES

Bennett v. Artuz, 199 F.3d 116 (2d Cir. 1999) ..... *passim*

Dictado v. Ducharme, 189 F.3d 889 (9th Cir. 1999) 4, 7

Hoggro v. Boone, 150 F.3d 1223 (10th Cir. 1998) 3, 8

Lovasz v. Vaughn, 134 F.3d 146 (3d Cir. 1998) 3, 4, 5, 10

McSheffrey v. Angelone, No. 98-6519, 1999 U.S. App. LEXIS 2735
(4th Cir. February 23, 1999) 3, 5

Ross v. Artuz, 150 F.3d 97 (2d Cir. 1998) 8

Tinker v. Hanks, 172 F.3d 990 (7th Cir. 1999) 4, 5, 6, 8

Villegas v. Johnson, 184 F.3d 467 (5th Cir. 1999) ..... *passim*

Webster v. Moore, 199 F.3d 1256 (11th Cir. 2000) 6, 7, 8

Weekley v. Moore, __ F.3d __, No. 98-4218, 2000 WL 217493
(11th Cir. February 24, 2000) 2, 6, 7

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Tony Bruce Bennett, respectfully requests that the Court deny the Petition for a Writ of Certiorari seeking review of the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on October 25, 1999, reproduced in the Appendix to the Petition for a Writ of Certiorari at 4a-20a, and reported in *Bennett v. Artuz*, 199 F.3d 116 (2d Cir. 1999).

STATEMENT OF THE CASE

The petitioner, Christopher Artuz, Superintendent of the Greenhaven Correctional Facility, asks the Court to address the scope of the tolling provision contained in the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") which suspends the one-year statute of limitations imposed on state habeas petitioners wishing to obtain habeas corpus review of their state convictions while a petitioner's "properly filed" state post-conviction motion is "pending."

Respondent does not dispute the Petitioner's Statement of the Case.

REASONS FOR DENIAL OF THE WRIT

While seven circuit courts have interpreted the meaning of "properly filed" in 28 U.S.C. § 2244(d)(2), six of these seven courts have issued consistent decisions, including the Second Circuit's decision below. Only the Eleventh Circuit's recent decision, issued after Petitioner Artuz's petition was filed, is in direct conflict with the decision below. In addition, review is unwarranted because: (1) the states, themselves, have the ability to limit state habeas petitioners' access to the federal courts independent of the federal courts' construction of the AEDPA's tolling provision; (2) a decision by this Court will have little practical impact as the

tolling provision in question has long since expired on the vast majority of state habeas petitioners' applications for relief in federal court; and (3) the facts of this case are such that the Court would have to delve into the merits of Respondent's state post-conviction application.

I. THE SECOND CIRCUIT'S DECISION IS CONSISTENT WITH ALL BUT ONE OF THE SIX OTHER CIRCUITS THAT HAVE ADDRESSED WHAT CONSTITUTES A "PROPERLY FILED APPLICATION" FOR PURPOSES OF TOLLING THE STATUTE OF LIMITATIONS UNDER THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996.

At issue here is whether the AEDPA tolling provision applies to the filing of a successive petition for habeas relief in state court where state procedural rules bar review of the merits except under limited circumstances. As to that issue, it is respectfully argued that only the decision of a divided panel of the Eleventh Circuit is irreconcilable with the Second Circuit. *See Weekley v. Moore*, -- F.3d --, No. 98-4218, 2000 WL 217493 (11th Cir. February 24, 2000) (decided after the submission of the Petition herein). Respondent acknowledges that there is a split in authority between the Eleventh Circuit and the six other circuits that have interpreted the meaning of a "properly filed application" for purposes of the tolling provision. *See* Petition 10-13. However, the "wide split in authority" and "irreconcilable interpretations" to which Petitioner refers, *id.* at 9 and 10, respectively, misconstrue the holding of some of the circuit decisions and overstate their differences. Because the split among the circuits is largely illusory, and, with one exception, not inconsistent with the decision below, this Court's discretionary review is unwarranted in this case.

In the case at bar, the Second Circuit held that a successive post-conviction application for relief filed in a New York state court is "properly filed" under 28 U.S.C. § 2244(d)(2) for purposes of tolling the statute of limitations for respondent's federal habeas

petition even if the state court is procedurally barred from addressing the merits of the application. *Bennett v. Artuz*, 199 F.3d 116 (2d Cir. 1999). This decision is on "all fours" with three other circuits that specifically found the tolling provision applicable to the filing of even meritless successive state petitions for relief. *Lovasz v. Vaughn*, 134 F.3d 146, 148 (3d Cir. 1998); *Villegas v. Johnson*, 184 F.3d 467, 469-70 (5th Cir. 1999); *McSheffrey v. Angelone*, No. 98-6519, 1999 U.S. App. LEXIS 2735 at *5 (4th Cir. February 23, 1999). Indeed, the Fourth and Fifth Circuits, and now the Second Circuit, expressly adopt the narrow interpretation of *Lovasz*, 134 F.3d at 148, that "'a properly filed application' is one submitted according to the state's procedural requirements, such as the rules governing the time and place of filing;" *see Villegas*, 184 F.3d at 467 (same); *McSheffrey*, 1999 WL 89403 at *2 ("[a] state application is properly filed if it complies with the state procedural requirements for successive collateral attacks on a conviction, such as the timeliness and proper place of filing"). Consistent with the Second, Third, Fourth and Fifth Circuits, the Tenth Circuit adopted the same narrow interpretation of "properly filed," without elaboration, in declining to toll the limitations period while a time-barred state habeas appeal was pending. *Hoggro v. Boone*, 150 F.3d 1223, 1226 n. 4 (10th Cir. 1998). *See* Petition at 11 (Tenth Circuit follows majority view).

The *Bennett* Court cited to the "majority view" in *Lovasz* and *Villegas, id.*, 199 F.3d at 121, and, quoting extensively from *Villegas*, adopted the majority's "narrow[]" construction of what constitutes a "properly filed" application. *Id.* at 122-23. Thus, it concluded, "'properly filed' [] mean[s] simply that an application for post-conviction relief recognized as such under governing state procedures has been filed." *Id.* at 123. By this construction, and in reliance on *Lovasz* and *Villegas*, the *Bennett* Court meant nothing more

than that federal courts should not inquire into the merits of an application for post-conviction relief to determine if it was "properly filed," and require only that the application meets the state's procedural rules, such as time and place of filing *Id.* at 122.

Petitioner characterizes the decisions of two other circuits as inconsistent with the majority view. *See* Petition at 11-12, *citing Dictado v. Ducharme*, 189 F.3d 889 (9th Cir. 1999); *Tinker v. Hanks*, 172 F.3d 990, 991 (7th Cir. 1999). On close inspection, these decisions are in accord with the majority view that an application must meet the state's procedural requirements such as time and place of filing. In *Dictado*, a divided panel of the Ninth Circuit explicitly followed *Lovasz* in holding that a state petitioner's fourth post-conviction application for relief was not "properly filed" because it "did not comply with Washington's rules governing the time of filing." *Dictado*, 189 F.3d at 892 (emphasis added).

The *Dictado* Court stated that since *Lovasz*

> does not suggest that the standard for a 'properly filed' application under the AEDPA is more lenient than the relevant state procedural law (footnote 2 omitted) . . . [t]o hold that Dictado's procedurally defective application was 'properly filed' would require us to ignore the explicit holding of the Washington Supreme Court.

Id. The Washington Supreme Court had denied review, concluding that the application was both time-barred and successive. *Id.* at 891. Finding the time bar dispositive, however, the *Dictado* Court explicitly declined to address the other ground relied on by the state supreme court -- the specific issue in *Lovasz* -- whether a "frivolous but otherwise procedurally proper filing in state court is 'properly filed.'" *Id.* at 892, n. 2. Clearly, *Dictado* did not reach the question of the habeas petition's successiveness.

Nor is the Seventh Circuit's holding in *Tinker v. Hanks*, 172 F.3d 990, 991 (7th Cir. 1999), inconsistent with the majority view. There, the Seventh Circuit found that a successive post-conviction motion was not "properly filed" where the state petitioner was denied leave to file by the appellate court as required by Indiana's procedural laws. The *Tinker* Court reasoned that the state filing requirement, like the federal requirements in 28 U.S.C. §§ 2244(a),(b), was not intended to invite state petitioners to file repeated petitions to toll indefinitely the deadline for their federal habeas action. *Id.*, 172 F.3d at 991. However, *Tinker* relied on the "screening mechanisms created by these statutes" to "determine when an application for post-conviction relief is proper (as in 'properly filed')." *Id.*

In ruling that an application is not "properly filed" if leave to file was denied, The *Tinker* Court does no violence to the majority view that a "properly filed application" must satisfy the state's procedural filing requirements. *Cf.* Petition at 12. Significantly, there was no pre-filing "screening mechanism" in the state procedural laws at issue in the other four circuit court decisions considering whether frivolous successive petitions were "properly filed applications" under 28 U.S.C. § 2244(d)(2). *See Lovasz*, 134 F.3d at 149 (42 Pa.Cons.Stat. Ann. § 9545(b)(1)); *McSheffrey*, 1999 WL 89403 at *1 n. 1 (Va.Code. Ann § 8.01-654(B)(2)); *Villegas*, 184 F.3d at 471 (Tex.Crim.P.Code.Ann. art. 11.07); *Bennett*, 199 F.3d at 121 (N.Y. McKinney's C.P.L. § 440.10).

Indeed, the *Villegas* Court, in *dicta*, contemplated pre-filing requirements like Indiana's in "hold[ing] that a properly filed application for § 2244(d)(2) purposes is one that conforms with a state's applicable procedural filing requirements." *Villegas*, 184 F.3d at 470. In the footnote which immediately follows, it states:

> By procedural filing requirements, we mean those prerequisites that must be satisfied before a state court will allow a petition to be filed and accorded some level of judicial review. Such filing requirements are not limited to the rules governing notice and the time and place of filing and may include, for example, a requirement that the petitioner obtain judicial authorization for the filing.

Id. at n. 2. (Emphasis added) The *Tinker* decision, therefore, broadens the majority view only in the sense of clarifying that a state's leave to appeal requirement, where applicable, is another procedural filing rule (like time and place of filing) needed for an application to be "properly filed."

Only the recent Eleventh Circuit decision in *Weekley v. Moore*, -- F.3d --, No. 98-4218, 2000 WL 217493 (11th Cir. February 24, 2000) cannot be reconciled with the majority view. In that case, petitioner filed three post-conviction motions in state court pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure. *Weekley*, 2000 WL 217493 at *1. The second and third motions were denied as successive, and these decisions were affirmed on appeal in state court. *Id.* The divided *Weekley* panel held that state court filings which the state courts dismissed as successive were not "properly filed" for purposes of the AEDPA tolling provision. *Id.* at *3. It deemed this holding an "extension" of its recent decision in *Webster v. Moore*, 199 F.3d 1256 (11th Cir. 2000), which serves to encourage state court exhaustion while not allowing procedurally defective motions to toll the period for filing a federal habeas action. *Id.* In *Webster*, the Eleventh Circuit held that a third successive petition under Rule 3.850 was procedurally barred by the statute of limitations applicable to that rule. *Id.* at 1258. Even Petitioner here agrees that *Webster*, with its focus on "mere technical requirements concerning time and place of filing," reflects the majority of circuits' narrow interpretation of "properly

filed." Petition at 11.

The *Weekley* Court also relied on *Tinker* and *Dictado* to support its broader interpretation of "properly filed." However, it characterized *Dictado* as holding that "a state petition is not 'properly filed' if the petition is dismissed as successive under the state's procedural rules." *Id.* at *3. As illustrated above, the *Dictado* decision did not, in fact, reach this point. *Id.* 189 F.3d at 892 n. 2. The dissent in *Weekley* contended that the cases reflecting the majority view were "more persuasive" than *Dictado*, *Tinker* and *Webster*. *Id.* at *4. Further, echoing the majority view, it objected to any assessment on the merits of a post-conviction petition for purposes of determining whether it was "properly filed." *Id.*

As this analysis makes clear, only the recent *Weekley* decision issued by a divided panel of the Eleventh Circuit cannot be reconciled with the other circuit courts that have addressed a "properly filed application" for purposes of tolling the AEDPA's statute of limitations for state petitioners.

II REVIEW BY THIS COURT IS UNWARRANTED FOR THREE REASONS

A. STATES CAN INDEPENDENTLY LIMIT ACCESS TO FEDERAL COURT

Regardless of the federal courts' construction of the AEDPA's tolling provision, the states are nonetheless capable on their own of limiting state prisoners' ability to file successive petitions, which, in turn, limits their access to the federal courts. Even the majority view recognizes this obvious solution. Indeed, the Fifth Circuit in *Villegas*, almost anticipating the *Tinker* decision, noted in *dicta* that Texas could have chosen to limit the actual filing of successive petitions by requiring prior judicial authorization as opposed to simply limiting the availability of relief. *Villegas*, 184 F.3d at 471 and n. 3; *see Tinker*, 172 F.3d at 991 (AEDPA

limitations period not tolled by pendency of "leave to file" application that appellate court denied). States can also impose strict filing deadlines. *See, e.g., Webster*, 199 F.3d at 1258; *Hoggro*, 150 F.3d at 1226; *see also Bennett*, 199 F.3d at 123 ("states [can] place stricter restrictions on the filings that are the basis for tolling"), *quoting Villegas* 184 F.3d at 473. Consequently, states fearing an endless stream of frivolous habeas petitions can pass appropriate legislation without this Court's decision on the appropriate reach of the AEDPA's tolling provision.

B. 28 U.S.C.§ 2244(d)(2) APPLIES TO VERY FEW REMAINING PETITIONS

Review by this Court is unwarranted since few state petitioners seeking federal review of their convictions will be affected by any unifying construction of "properly filed" enunciated by this Court. Although Petitioner cites no basis for his contrary conclusion, Petition at 13-14, reason and logic dictate that there are only a meager number of state habeas cases still in the pipeline for which the AEDPA's one-year statute of limitations in § 2244(d)(2) has not yet run. State prisoners whose habeas claims accrued prior to the AEDPA's enactment had one year after the enactment -- to April 24, 1997 -- to file a federal habeas petition. *See, e.g., Ross v. Artuz*, 150 F.3d 97, 99 (2d Cir. 1998). Under the majority view, each day a state petition (even if frivolous) was "pending" tolled the one year clock. *See, e.g., Hoggro*, 150 F.3d at 1226 (calculating periods of tolling).

However, nearly two years have passed since the one year grace period expired. Assuming even lengthy delays in the state court system while state prisoners' post-conviction applications were "pending," the time to petition the federal courts for relief has certainly long

passed for most petitioners. [1] As the *Bennett* Court correctly found, even under the majority's narrow interpretation of "properly filed," state petitioners must be vigilant in pursuing their state claims to avoid a lapse of time under applicable filing requirements, and they cannot, therefore, "extend" "indefinitely" the running of the one-year clock. *Bennett*, 199 F.3d at 122.

C. THE COURT MUST DELVE INTO THE MERITS OF RESPONDENT'S STATE CLAIMS

Finally, were certiorari granted here, the Court would have to determine on the merits, and without guidance from any lower court, whether Mr. Bennett's second post-conviction application was properly barred as successive. In contrast to the record relied upon in the decisions of the other circuit courts, there is no indication in the record below of the basis or bases upon which the trial court relied in its summary denial of Mr. Bennett's second post-conviction application. Because Mr. Bennett filed his *pro se* petition in federal court without ever receiving a decision on his habeas application, there was no appeal.[2] In arguments before the Second Circuit, Respondent Artuz, reiterating the People's arguments in opposition to Mr. Bennett's state motion, *see* Petition at 6-7, asserted that Mr. Bennett's federal habeas claims

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[1] Mr. Bennett's circumstances were unusual in that his state habeas petition was technically still "pending" at the time of his federal habeas petition. It cannot possibly be known how many cases remain "pending" nationwide under similar circumstances. States can, however, avoid this result with stricter procedural laws that, for instance, require state courts to issue decisions promptly and require state petitioners to file their appeal within a specified time of receiving notice of the trial court's decision even if not served with the decision. *See Bennett*, 199 F.3d at 120, *citing* N.Y.Ct. Rules § 670.12(b)(1) & (b)(2)(vi).

[2] Nor has the lower federal court addressed the viability of those claims. Upon remand to the District Court following the Second Circuit's ruling in this case, Mr. Bennett's federal habeas petition was stayed pending the outcome of the instant petition for a writ of certiorari. Mr. Bennett's counsel on appeal continues to represent him before the District Court.

were subject to a mandatory bar under state law because one claim had already been decided on direct review, and the other had a sufficient factual basis for direct review. *Bennett*, 199 F.3d at 121. Resolution of these matters, particularly in the absence of a state court decision articulating the basis for denial, would involve this Court in a potentially nettlesome inquiry into the merits underlying each of Mr. Bennett's state claims. *See Lovasz*, 134 F.3d at 148-49.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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